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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 31

PRIME HEALTHCARE SERVICES – ENCINO, LLC d/b/a ENCINO HOSPITAL MEDICAL CENTER TECHNOLOGIES, INC., Respondent, SEIU LOCAL 121RN, Union, and SEIU, UNITED HEALTHCARE WORKERS-WEST, Union, PRIME HEALTHCARE SERVICES – GARDEN GROVE, LLC d/b/a/ GARDEN GROVE HOSPITAL AND MEDICAL CENTER, Respondent, SEIU, UNITED HEALTHCARE WORKERS-WEST Union.	Case Nos. 31-CA-066061; 31-CA-070323; 31-CA-080554; 21-CA-080722 **[*CORRECTED – CONFORMING BRIEF*]** **SEIU UHW-WEST'S ANSWERING BRIEF IN OPPOSITION TO RESPONDENTS' EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

On November 13, 2014, Administrative Law Judge Jeffrey D. Wedekind issued a Decision in this matter finding that Respondents Encino Hospital Medical Center and Garden Grove Hospital and Medical Center (Respondents) violated Sections 8(a)(1) and (5) of the National Labor Relations Act ("Act") by unilaterally ceasing the anniversary wage increase to bargaining unit employees and by failing and refusing to furnish relevant and necessary information responsive to the Union's information request. SEIU, United Healthcare Workers-West ("UHW" or "Union") submits this Answering Brief in Opposition to the Exceptions filed by Respondents and Respondents Brief in Support of the Exceptions. The preponderance of the evidence at trial demonstrated that the Respondents violated the Act. Moreover, Respondents failed to meet the heavy burden of proof to establish the disqualification defense, or any affirmative defense, relieved the Respondents of any duty to bargain with the Union. The ALJ, therefore, rejected the Respondents' affirmative disqualification/conflict of interest defense in ruling that the Respondents violated the Act.

The ALJ's decision should be upheld because the evidence at trial established that Respondents violated the Act. Furthermore, even applying the adverse inference evidentiary sanctions as to UHW, the ALJ correctly ruled that Respondents failed to meet the burden of proof as to the claimed disqualification/conflict of interest defense. The ALJ properly considered the extensive evidence in the record in issuing his decision. Indeed, the record demonstrated that Respondents recognized UHW as the exclusive bargaining representative of the employees employed at Encino and Garden Grove over six years ago; for the last three years they have bargained with UHW over a successor collective bargaining agreement; and have failed to raise these defenses or litigate these defenses in multiple NLRB matters.[1] As the Board stated in *Ridgewell's Inc.,* 334 NLRB 9, 334 NLRB 37 (2001), Respondents' "sudden

[1] *See, e.g., Encino Hosp. Med. Ctr.*, 359 NLRB No. 78 (2013) (failed to raised conflict of interest defense); *Prime Healthcare Services-Garden Grove, LLC d/b/a Garden Grove Hosp. & Med. Ctr.*, 357 NLRB No. 63 (2011) (same).

concern" with the alleged disqualifying conduct "is ironic because of its lack of any timely protests" in 2010, 2011, or 2012. *Id.* at 42. Respondents' delay in raising the disqualification defense and failure to raise it in other cases demonstrates that the defense was nothing but a ruse to engage in pre-litigation discovery related to Prime, Inc.'s federal anti-trust lawsuit which was pending during the subpoena phase litigation of the underlying unfair labor practice charges. Most telling is that Respondents admit never informing UHW that they had no obligation to bargain with UHW because the Union had lost its 9(a) status. (TR 579:8-13.) Respondents never raised it before because it was not necessary to raise it until they needed evidence to support their frivolous anti-trust litigation.

Indeed, the litigation of the unfair labor practice charges against the Respondents turned into an attempt by the Respondents to seek information that was not relevant to any of the allegations in the complaint issued by the General Counsel. Through the course of the hearing, Respondents litigated eight affirmative defenses. In reality, all of the facts upon which the majority of these affirmative defenses were based on hinged on the allegation that the Union engaged in some disqualifying conduct – based on its "strategic partnership" with Kaiser and its alleged campaign of "attacks and institutional hostility and disparagement" – that created a conflict of interest and disqualified it from representing the bargaining unit employees at Encino and Garden Grove. None of the evidence presented satisfied the heavy burden required to prove the disqualification defense, or any of the defenses for that matter. Accordingly, the ALJ properly rejected Respondents' affirmative defenses and correctly found that the Respondents violated the National Labor Relations Act by unilaterally eliminating the anniversary wage increase and by failing to provide information responsive to the Union's information request.

Additionally, notwithstanding the sanctions issued by the ALJ both as to UHW and the General Counsel, the record demonstrates that UHW substantially complied with the majority of the subpoenaed requests and that the General Counsel was not working in conjunction with

UHW. Finally, the ALJ's decision denying Respondents' request for fees and costs should be upheld because such an award was not warranted in this matter.

Therefore, the ALJ's decisions are entirely supported the by the evidence. The Board should dismiss the Respondents' Exceptions and adopt the ALJ's decision.

II. STATEMENT OF THE FACTS AND CASE

A. THE PARTIES

SEIU UHW is a labor organization that represents healthcare workers throughout the State of California. UHW represents employees in the bargaining units employed at Encino and Garden Grove.

Prime Healthcare Services – Encino LLC d/b/a Encino Hospital Medical Center is a private entity that provides hospital and healthcare services to patients and is the employer in the unfair labor practice proceeding.

Prime Healthcare Services – Garden Grove, LLC d/b/a Garden Grove Hospital & Medical Center is a private entity that provides hospital and healthcare services to patients and is the employer in the unfair labor practice proceeding.

Prime Healthcare Services, Inc. is *not* a party to these unfair labor practice proceedings.[2] (Consolidated Complaint, GC Exh. 1(kkk) at pp. 1-2, pp. 3-4, ¶¶ (2) – (3).) UHW does not have a collective bargaining relationship with Prime Healthcare Services, Inc.

On or about June 1, 2008, Respondent Encino became the employer of the bargaining unit employees represented by SEIU UHW, recognized UHW as the exclusive bargaining representative of the bargaining unit employees at Encino, and assumed the collective bargaining agreement in effect at that time (effective January 1, 2007 through March 31, 2011). Since that date, Encino has bargained exclusively with UHW over terms and conditions of the bargaining unit employees. UWH and Encino have bargained over a

[2] Indeed, in another NLRB matter involving unfair labor practices related to the termination of a discriminatee, Respondent Encino argued repeatedly to the ALJ that Prime the parent company was a distinct entity from Respondent Encino and that no evidence of animus by Prime the parent company should be relied upon at trial. That matter resulted in a published decision, *Encino Hosp. Med. Ctr.*, 359 NLRB No. 78 (2013).

successor collective bargaining agreement ("CBA") since approximately September 29, 2010 to the present.

On July 1, 2008, Respondent Garden Grove became the employer of the bargaining unit employees represented by SEIU UHW, recognized UHW as the exclusive bargaining representative of the bargaining unit employees at Garden Grove, and assumed the collective bargaining agreement in effect at that time, effective January 1, 2007 through March 31, 2011. Since that date, Garden Grove has bargained exclusively with UHW over terms and conditions of the bargaining unit employees. From approximately October 14, 2010 to the present, Garden Grove and UHW have engaged in bargaining over a successor collective bargaining agreement ("CBA").

During the term of the CBA between Encino and UHW, Encino granted anniversary wage step increases to employees in the bargaining unit pursuant to Article 13 of the CBA. Following the expiration of the CBA, only twenty-one (21) out of sixty-one (61) Encino bargaining unit employees eligible for the anniversary wage step increase, received said increase.

On May 7, 2012, UHW filed an unfair labor practice charge alleging a violation of Sections 8(a)(1) and (5) for engaging in a unilateral change in terms and conditions of employment and for failing to honor the anniversary wage increase.

On July 25, 2012, UHW filed an amended unfair labor practice charge alleging that Encino violated Sections 8(a)(1) and (5) of the Act when it unilaterally changed terms and conditions of employment by failing to honor the anniversary dates in the CBA and when Encino failed to provide information.

During the term of the CBA between Garden Grove and UHW, Garden Grove granted anniversary wage step increases to employees in the bargaining unit pursuant to Article 13 of the CBA. Following the expiration of the CBA, Garden Grove has not granted anniversary wage increases to eligible Garden Grove bargaining unit employees.

On May 7, 2012, UHW filed an unfair labor practice charge alleging that Garden Grove violated Sections 8(a)(1) and (5) of the Act when it engaged in a unilateral change in terms and conditions of employment by failing to honor the anniversary dates in the CBA.

On July 25, 2012, UHW filed an amended unfair labor practice charge that Garden Grove violated Sections 8(a)(1) and (5) of the Act when it unilaterally changed terms and

conditions of employment by failing to honor the anniversary dates in the CBA and when Garden Grove failed to provide information.

The parties do not dispute that following the expiration of the Encino and Garden Grove contracts that the parties agreed that the anniversary wage increases would survive the expiration of the contracts. (TR 185:17-25; 186:1-3; 260:18-22; 261:12-16; 266:13-25; 267:1-14; 571:16-25; 572:20-21.) And, there is likewise no dispute that the Respondents Encino and Garden Grove never gave the Union notice of the discontinuation of the anniversary wage increase, and the Union never agreed to the discontinuation. (TR 189:3-13.)

On January 31, 2013, Region 31 issued complaint on the charges filed by UHW against Encino and Garden Grove in an Order Further Consolidating Cases, Consolidated Complaint and Notice of Hearing where UHW's charges were consolidated with charges previously filed by a separate local union, SEIU Local 121RN, which represents RN's at Encino and Garden Grove.

On February 14, 2013, Respondents Encino and Prime filed their Answer to Order Further Consolidating Cases, Consolidated Complaint, and Notice of Hearing. Respondents' Answer alleged various affirmative defenses, including that the allegations are time barred (Affirmative Defense (Aff. Def.) No. 7); that the Union has unclean hands and bargained in bad faith (Aff. Def. Nos. 3 & 4); that the Union requested the information in bad faith and to harass (Aff. Def. No. 5.); that the Union's conduct disqualifies it from representing the employees (Aff. Def. No. 6.); that the Union waived the right to bargain over the wage increases (Aff. Def. No. 8); and that the wage increases are a matter of contract interpretation (Aff. Def. No. 9), over which the NLRB lacks jurisdiction.[3] (Aff. Def. No. 10.)

B. THE SUBPOENAS AND PETITIONS TO REVOKE

On April 15, 2013, Respondents Encino and Garden Grove served subpoenas duces tecum for documents to SEIU UHW, Richard Ruppert, David Regan and Kim Davis. In its subpoena to UHW, Encino and Garden Grove sought eighty-six (86) items. UHW contends that a vast majority of the items requested had no bearing whatsoever to the unfair labor

[3] Respondents did not provide a factual basis or "some articulable reason" in support of any of its affirmative defenses raised in their Answer. *Flaum Appetizing Corp.*, 357 NLRB No. 162 (2011)(ordering the Respondent to file a bill of particulars or have the affirmative defenses stricken).

practices alleged in the Consolidated Complaint. Respondents' forty-one (41) item subpoena to Richard Ruppert included many identical requests made to UHW. Again, a vast majority of the items requested had no bearing whatsoever to the unfair labor practices alleged in the Consolidated Complaint. Similarly, Respondents issued a sixteen (16) item subpoena directed to UHW President David Regan, and a three (3) item subpoena directed to Garden Grove employee and UHW member, Kim Davis.

On April 22, 2013, UHW timely filed petitions to revoke and quash the subpoenas duces tecum directed to UHW, to Richard Ruppert ("Ruppert"), to David Regan ("Regan") and to Kim Davis ("Davis"). On April 23, 2013, UHW filed *amended* petitions to revoke and quash the same subpoenas.

On April 26, 2013, Respondents filed oppositions to UHW's petitions to revoke the subpoenas directed to UHW, Ruppert, Regan and Davis. In their oppositions, Respondents lumped together the charging parties and included facts regarding alleged conduct and actions taken by entities that are not parties to this unfair labor practice proceeding to support its conflict of interest affirmative defense. Respondents' oppositions misstated the law with respect to the disqualification of a union as collective bargaining representative based on a conflict of interest. Specifically, Respondents alleged that a disabling conflict of interest may exist in two contexts: (1) "where a union engages in conduct that is hostile to the employer" (citing *Sahara Datsun, Inc.*, 278 NLRB 1044, 1046 (1986)); and, (2) "where a union engages in conduct that is competitive with the employer employing the bargaining unit members the union represents" (citing *Catalytic Industrial Maintenance, Co.*, 209 NLRB 641, 642 (1974). Respondent then incorrectly claimed that both of these circumstances were "present in this case." Respondents' claims were a complete misrepresentation.

C. ALJ WEDEKIND'S RULING AND ORDER RE: PETITION TO REVOKE

On April 29, 2013, the day before the first day of trial in the unfair labor practice proceeding, the ALJ issued his Order finding that Respondents had articulated a factual basis in support of the conflict of interest defense and that "at least some of the requests are also relevant to the Respondents' 'conflict of interest' theory." (ALJ April 19, 2013 Dec. at 5.) The ALJ cited the following cases in support of his finding: *Catalytic Industrial Maintenance Company*, 209 NLRB 641, 645-46 (1974); *Visiting Nurse Assn., Inc.*, 254 NLRB 49, 51

(1981); *Pony Express Courier Corp.*, 297 NLRB 171, 172 (1989); *Sahara Datsun, Inc.*, 278 NLRB 1044, 1046 (1986); and *Garrison Nursing Home*, 239 NLRB 122 (1989). The Union disagreed with the ALJ's finding and reliance on the case law cited.

ALJ Wedekind's decision relied on the following examples of alleged "overt acts taken against Prime and its hospitals" that were cited by Respondents in their oppositions to the petitions to revoke filed by the charging parties and third party SEIU:

1) In May 2010, an SEIU-UHW representative (Amanda Cooper) gave a presentation at a "Strategic Campaigns" workshop outlining the unions' planned attacks against Prime and declaring that blocking Prime form acquiring hospitals was one of the campaign's primary goals;

2) Several months later, in October 2010, SEIU-UHW prepared and published a false and misleading "study" alleging that Prime's hospital's experienced unusual high rates of septicemia;

3) In January 2011, SEIU-UHW published a second study alleging malnutrition at Prime's hospitals (as well as repeating the septicemia allegations), but "expressly omitted" Kaiser, even though one of its hospitals had the highest rates for malnutrition according to a 2009 California study;

4) SEIU and its allies obtained the assistance of a media organization, California Watch, to publish numerous articles attacking Prime on baseless grounds, while avoiding criticism of Kaiser and "inundated" consumers, physicians, government officials, public interest organizations, and others with the SEIU reports and used them to initiate federal and state investigations of Prime;

5) Following the initial septicemia attacks, SEIU-UHW requested California officials to stop issuing hospital licenses to Prime until the investigations were complete;

6) In November 2010, after Prime acquired Alvarado Hospital in San Diego, SEIU contacted California public health officials, falsely alleged that Prime was violating licensing laws, demanded that the state agency initiate legal action against Prime, and advocated for passage of state legislation designed to retaliate against Prime for acquiring Alvarado and restrict Prime for acquiring additional hospitals;

7) In September 2011, SEIU worked to prevent Prime from purchasing Victor Valley Community Hospital;

8) In early 2013, SEIU solicited the assistance of an SEIU-UHW bargaining unit employee at Garden Grove (Kim Davis) to testify at a public hearing in opposition to Prime's acquisition of two hospitals in Kansas;

9) SEIU-UHW and Kaiser designed legislation to impose sanctions on Prime, which SEIU-UHW threatened to push through the legislature if Prime did not capitulate to the union's anti-competitive demands; and

10) SEIU-UHW also prepared and obtained the necessary signatures for two ballot initiatives that targeted Kaiser's competitors while specifically excluding Kaiser and another SEIU organized hospital.

(ALJ Dec. at 4.) None of these acts supported a disqualification or conflict of interest defense. Moreover, during the course of the three-day hearing, Resondents did not present any evidence to support or corroborate the conduct numbered 1, 7, 8, 9, and 10, above.

1. <u>Subpoena Duces Tecum to UHW</u>

The ALJ granted and denied in part UHW's petition to revoke and ordered UHW to produce documents responsive to the following requests.

Specifically, the ALJ revoked Request Nos. 17 and 19 as overbroad to the extent they seek documents other than the constitution and bylaws of the SEIU and SEIU-UHW, effective January 2010 to date. Those requests seek:

17. Documents from January 2009 to the present concerning SEIU's relationship with the Union, SEIU's involvement in the affairs of the Union, or the Union's involvement in the affairs of the SEIU, including but no limited to constitutions and bylaws, and communications and correspondence.

19. Documents from January 2009 to the present concerning the Union's relationship with SEIU Local 121RN, the Union's involvement in the affairs of SEIU Local 121 RN, or SEIU Local 121RN's involvement in the affairs of the Union, including but not limited to constitutions and bylaws, and communications and correspondence.

ALJ Wedekind narrowed request 24 and 25 as to time, requiring production of documents responsive to Request No. 24, from January 2010 to the present.

24. Documents concerning any money, funds, or other compensation of any kind, including but not limited to any checks, electronic funds transfers, wire transfers, or other form of payment or monetary transfer, that the Union provides, remits, or pays, has provided, remitted, or paid, or that the Union expects to provide, remit or pay to SEIU Local 121RN from January 1, 2009 to the present.

25. Documents concerning any money, funds, or other compensation of any kind, including but not limited to any checks, electronic funds transfers, wire transfers, or other form of payment or monetary transfer, that SEIU Local 121RN provides, remits, or pays, has provided, remitted, or paid, or that the Union expects SEIU Local 121RN to provide, remit or pay to the Union from January 1, 2009 to the present.

Requests numbers 28 and 34 were revoked to the extent they seek documents other than notes taken by SEIU-UHW representatives during bargaining sessions.

28. Documents concerning the negotiation of the terms set forth in Article 13 Sections 3 and 5 of the Encino CBA, including but not limited to notes taken by any Union representative during bargaining over those terms.

34. Documents concerning the negotiation of the terms set forth in Article 13 Sections 3 and 5 of the Garden Grove CBA, including but not limited to notes taken by any Union representative during bargaining over those terms.

Requests 29, 35, 42-52, and 54, the ALJ denied the petition to revoke those requests to the extent they seek documents since January 2010.

29. Documents that were exchanged between the parties during bargaining over the language contained in Article 13, Sections 3 and 5 of the Encino CBA.

35. Documents that were exchanged between the parties during bargaining over the language contained in Article 13, Sections 3 and 5 of the Garden Grove CBA.

42. Documents concerning any efforts by the Union or the Coalition to block or prevent the acquisition of hospitals by Prime.

43. Correspondence between or among any or all of the Union, the Coalition, Kaiser, or any other third party with respect to the acquisition of hospitals by Prime.

44. Documents concerning any efforts by the Union, the Coalition, and Kaiser to advocate for the passage of California State Bill 1953 ("SB 1953").

45. Correspondence between or among the Union, the Coalition, Kaiser, or any third party with respect to SB 1953.

46. Documents concerning any efforts by the Union, the Coalition, and Kaiser to advocate for the passage of California Senate Bill 408 ("SB 408").

47. Correspondence between or among the Union, the Coalition, Kaiser, or any third party with respect to SB 408.

48. Documens concerning any efforts by the Union, the Coalition, and Kaiser to advocate for the passage of California Senate Bill 1285 ("SB 1285").

49. Correspondence between or among the Union, the Coalition, Kaiser, or any third party concerning SB 1285.

50. Documents concerning any efforts by the Union, the Coalition, and Kaiser to advocate for the passage of California Sentate Bill 359.

51. Documents concerning any communications between or among the Union, the Coalition, Kaiser, or any third party with respect to SB 359.

52. Documents relied upon by the Union in preparing the report "Septicemia at Prime Hospitals."

54. Documents relied upon by the Union in preparing the report "Care and Coding at Prime Healthcare Services."

The ALJ found Requests 64 and 65 vague and overbroad to the extent they seek documents other than the actual agreements between Kaiser and SEIU-UHW or the Coalition.

64. Documents concerning any agreements, including verbal agreements, side letters and neutrality agreements but excluding any local collective bargaining agreements,

between or among the Union and Kaiser, or to which the Union and Kaiser are signatories, that are currently in effect, as well as those that have expired within the last five years.

65. Documents that discuss, describe, refer to, relate to, or reflect any agreements, including verbal agreements, side letters and neutrality agreements between or among the Coalition and Kaiser, or to which the Coalition and Kaiser signatories, that are currently in effect, as well as those that have expired within the last five years.

The ALJ denied the petition to revoke requests 66 and 76 – 78 to the extent they seek documents reflecting payments from Kaiser to SEIU-UHW, the Coalition, or the LMP Trust since January 2010. The request was otherwise revoked as overbroad.

66. Documents from January 2009 to the present concerning any money, funds, or compensation of any kind, other than payments made pursuant to collective bargaining agreements with local unions, including but not limited to any checks, electronic funds transfers, or other form of payment or monetary transfer, that Kaiser provides, remits, or pays, has provided, remitted or paid, or that the Union expects Kaiser to provide, remit or pay to the Union.

76. Documents concerning any money, funds, or compensation of any kind, other than payments made pursuant to local union collective bargaining agreements, including but not limited to any checks, electronic funds transfers, wire transfers, or other form of payment or monetary transfer, that Kaiser provides, remits, or pays, has provided, remitted or paid, or that the Union expects Kaiser to provide, remit or pay to the Union from January 2009 to the present.

77. Documents concerning any money, funds, or compensation of any kind, other than payments made pursuant to local union collective bargaining agreements, including but not limited to any checks, electronic funds transfers, wire transfers, or other form of payment or monetary transfer, that Kaiser provides, remits, or pays, has provided, remitted or paid, or that the Union expects Kaiser to provide, remit or pay to the Coalition from January 2009 to the present.

78. Documents concerning any money, funds, or compensation of any kind, other than payments made pursuant to local union collective bargaining agreements, including but not limited to any checks, electronic funds transfers, wire transfers, or other form of payment or monetary transfer, that Kaiser provides, remits, or pays, has provided, remitted or paid, or that the Union expects Kaiser to provide, remit or pay to the LMP Trust from January 2009 to the present.

The ALJ denied UHW's petition to revoke request 69 to the extent the request seeks documents concerning the ownership by Union or its affiliates in any shares in Kaiser since January 2010. The request was otherwise revoked as overbroad.

69. Documents concerning the ownership by the Union or any of its affiliates of any shares of Kaiser, Kaiser Federal Bank, or Kaiser Federal Financial Group, Inc. This request includes but is not limited to any communications or documents regarding any shareholder activities, initiatives, strategies, or other actions.

The ALJ granted UHW's petition to revoke Request 70 to the extent the request seeks documents before January 2010 or involving competitors of Prime other than Kaiser.

70. Documents concerning the Union's involvement, whether at the federal, state or local level, in the purchase, sale, ownership, reorganization, or renaming of hospitals by Prime or its market competitors. This request specifically includes but is not limited to the Union's involvement in hospital acquisition or licensing issues.

The ALJ denied UHW's petition to revoke Requests 79 and 80 to the extent the requests seek documents since January 2010.

79. Documents from January 2009 to the present concerning any efforts by the Union to market or advertise the services of Kaiser.

80. Documents from January 2009 to the present concerning: (1) the obligations of the Union or the Coalition pursuant to the LMP; (2) the obligations of Kaiser pursuant to the LMP; (3) the goals, objects, benchmarks, or targets of the LMP; (4) the manner or method in

which the parties to the LMP measure the success of the LMP; (5) whether and to what extent the goals, objects, benchmarks or targets of the LMP have been met.

2. Subpoena Duces Tecum to Richard Ruppert

Similarly, the ALJ granted in part and denied in part UHW's petition to revoke the subpoena duces tecum directed to Richard Ruppert. Specifically, the ALJ revoked Request Nos. 17 and 19 as overbroad to the extent they seek documents other than the constitution and bylaws of the SEIU and SEIU-UHW, effective January 2010 to date.

17. Documents from January 2009 to the present concerning SEIU's relationship with the Union, SEIU's involvement in the affairs of the Union, or the Union's involvement in the affairs of the SEIU, including but no limited to constitutions and bylaws, and communications and correspondence.

19. Documents from January 2009 to the present concerning the Union's relationship with SEIU Local 121RN, the Union's involvement in the affairs of SEIU Local 121 RN, or SEIU Local 121RN's involvement in the affairs of the Union, including but not limited to constitutions and bylaws, and communications and correspondence.

The ALJ revoked Requests 20 and 21 to the extent they seek documents other than those describing Ruppert's job duties since January 2010.

20. documents, including but not limited to job descriptions, job postings, resumes, and curriculum vitae, concerning your job duties and responsibilities as Negotiator or any other position that you have held in the past five years, or currently hold, with, for, or on behalf of the Union.

21. Documents, including but not limited to manuals, textbooks, directives, pamphlets and memoranda, that you use or rely upon in performing your duties with, for, or on behalf of the Union.

Because the ALJ found that Request 26 was the same as Request 28 to UHW, the ALJ revoked Request 26 to the extent it seeks documents other than notes taken by SEIU-UHW representatives during bargaining sessions.

26. Documents and correspondence concerning the negotiation of the terms set forth in Article 13 Sections 3 and 5 of the Encino CBA relating to annual hospital wage increases and annual anniversary wage scale increases, including but not limited to, notes taken by any Union representative during bargaining over those terms.

Because the ALJ found that Request 27 to Ruppert was the same as Requests 29 to UHW, the ALJ denied the petition to revoke those requests to the extent they seek documents since January 2010.

27. Documents that were exchanged between the parties during bargaining over the language contained in Article 13, Sections 3 and 5 of the Encino CBA.

The ALJ revoked Requests 28 through 31 and 34 in their entirety because they are same as requests 30 through 33 and 36 to Union. Because Request 32 is the same request 34 to the Union, the ALJ revoked the request to the extent it seeks documents other than notes taken by SEIU-UHW representatives of the parties' bargaining sessions.

32. Documents and correspondence concerning the negotiation of the terms set forth in Article 13 Sections 3 and 5 of the Garden Grove CBA including but not limited to, notes taken by any Union representative during bargaining over those terms.

Because Request 33 is the same as Request 35 to the Union, the ALJ denied the petition to revoke this request to the extent it seeks documents since January 2010.

33. Documents that were exchanged between the parties during bargaining over the language contained in Article 13, Sections 3 and 5 of the Garden Grove CBA.

3. <u>Subpoena Duces Tecum to David Regan</u>

Likewise, the ALJ denied UHW's petition to revoke the subpoena duces tecum directed to the President of SEIU UHW, David Regan. The Respondents seeks 16 types of documents from the President of UHW. Specifically, the ALJ revoked requests 7, 9, 10-12, in their entirety. (ALJ Dec. p. 13.) However, the ALJ denied the petition to revoke requests 1-6, 8, 13-16, which the ALJ found were similar to requests 42-52, 54, 79, and 80 to the Union, to the extent the requests seek documents since January 2010. (ALJ Dec. p. 12.)

1. Documents concerning any efforts by the Union SEIU, or the Coalition to block or prevent the acquisition of hospitals by Prime.

2. Documents concerning the efforts by the Union, SEIU, the Coalition and Kaiser to advocate for the passage of California's State Bill 1953 ("SB 1953").

3. Documents concerning the efforts by the Union, SEIU, the Coalition and Kaiser to advocate for the passage of California's Senate Bill 408 ("SB 408").

4. Documents concerning the efforts by the Union, SEIU, the Coalition and Kaiser to advocate for the passage of California's Senate Bill 1285 ("SB 1285").

5. Documents concerning the efforts by the Union, SEIU, the Coalition and Kaiser to advocate for the passage of California's Senate Bill 359 ("SB 359").

6. Documents concerning the preparation of the Union's report entitled "Septicemia at Prime Hospitals."

8. Documents concerning the preparation of the Union's report entitled "Care and Coding at Prime Healthcare Services."

13. Documents concerning the goals, objects, benchmarks or targets of the LMP.

14. Documents concerning whether the goals, objects, benchmarks or targets of the LMP have been met.

15. Documents concerning the reasons for the formation of the LMP.

16. Documents concerning any efforts by the Union or SEIU to market the services provided by Kaiser.

4. <u>Subpoena Duces Tecum to Kim Davis</u>

Finally, the ALJ denied in its entirety UHW's petition to revoke the subpoena duces tecum directed to Kim Davis, except that Request 3 is revoked to the extent it seeks documents reflecting payments from third parties other than Kaiser.

1. Documents concerning communications or correspondence between or among you, SEIU, and SEIU-UHW regarding your attendance or testimony at the March 27 Public hearing.

2. Documents concerning any materials you relied upon in providing testimony at the March 27 Public Hearing.

3. Documents concerning any money, funds, or any other payments in connection with your attendance or testimony at the March 27 Public Hearing, including but not limited to any checks, electronic funds transfers, wire transfers, or other form of payment or monetary transfer made to you by SEIU, SEIU-UHW, or any third party. EXCEPT that this is revoked to the extent it seeks documents from third parties other than Kaiser.

D. ALJ WEDEKIND'S RULING AND ORDER RE: THE UNION'S MAY 29TH MOTION TO STRIKE VARIOUS DEFENSES

On June 10, 2014, the hearing resumed in this matter. At the outset of the hearing, Judge Wedekind ruled on the Union's May 29, 2014 Motion to Strike defenses Three through Five and Seven through Ten. (TR 12:2-13.) Judge Wedekind treated the Union's motion as a bill of particulars and requested that the Respondents go through each defense and explain the facts that support each defense. (TR 13:4-9; TR 14:8-10.) Respondents responded as follows:

- As to the third defense of unclean hands, Respondents stated that the conduct that supports the conflict of interest defense (Sixth Defense) also supported the unclean hands defense.
- With respect to the Fourth Defense that the Union bargained in bad faith, Respondents stated that the facts which supported this defense were the Union's refusal to provide information in response to requests by the Employer and the Union's conduct of requesting information that served no purpose other than to either harass or vex the Respondents.
- The Fifth Defense is in essence identical to the Fourth Defense as it claims that the Union requested information in bad faith or for harassment. (TR 14:8-14.)
- Respondents' Seventh Defense alleges that the allegations are time-barred. However, during the hearing, Respondents' counsel, Mr. Turzi, stated that Respondents did not know of any allegations that were time-barred and provided no facts to support this defense. (TR pp. 20-24.)
- The Eighth Defense alleged by the Respondents is that the Union waived the right to bargain. Respondents represented that the Eighth Defense was related to the bad faith

defense and had no additional facts, other than the alleged bad faith and disqualifying conduct to support the Eighth Defense. (TR 15:9-15; 22-25; 16:1-12.)

- The Ninth Defense alleged by Respondents is that the underlying unfair labor practice charge concerning the anniversary wage increase is a bona fide dispute over the interpretation of a collective bargaining agreement, and the Tenth Defense alleges that the Board lacks jurisdiction to adjudicate disputes over interpretation of collective bargaining agreements. At the hearing, Respondents also stated in support of the Ninth and Tenth Defenses that it is not bad faith bargaining to merely take a reasonable position or an interpretation of a contract. (TR 16:19-25; TR 17:1-3.)

In ruling on UHW's motion to strike, Judge Wedekind limited the Respondents to introducing evidence on the facts that were described at the commencement of the hearing. (TR 19:4-11.)

E. ALJ WEDEKIND'S RULING AND ORDER RE: SANCTIONS

On June 10, 2014, ALJ Wedekind issued his ruling on Respondents' motion for sanctions due to UHW's alleged non-compliance with the Respondents' subpoena duces tecum. (TR pp. 45 - 57.) The ALJ ruled that the full range of evidentiary sanctions was appropriate in this matter. The ALJ ruled that UHW would not be able to cross-examine the Respondents' witnesses who testified in support of the disqualification defense and UHW was prohibited from presenting any evidence. (TR 55:1-11.)

With respect to the General Counsel, the ALJ ruled that sanctions should also apply to the General Counsel. (TR 56:7-8.) The ALJ stated that the interest of the General Counsel and the UHW, charging party, seemed to him to be "wholly aligned in this case." (TR 56:7-10.) The ALJ stated that the General Counsel's complaints are based on the charging party's charges and asserts the same theories and seeks the same results. The ALJ further stated that he agreed with Administrative Law Judge Geoffrey Carter in the *Station Casinos*, 358 NLRB 153 (2012) decision. In that case, the ALJ struck the testimony of the General Counsel's witnesses because the charging party had not complied with the respondent's subpoenas. The ALJ further stated that another reason why he believed sanctions should apply to the General Counsel is because the General Counsel supported the Union's petition to revoke the subpoenas and motions to strike the underlying defense, and failed to timely seek judicial

enforcement of the subpoena despite the UHW and the SEIU clear refusal to comply and repeated requests by the Respondents for enforcement. (TR 56:19-25; 57:1-9.)

Thereafter Counsel for the General Counsel and Counsel for UHW stated the reasons for which they disagreed with the Judge's ruling, in particular, focusing on the factual inaccuracies and the recitation of facts. (TR 64-66; 284:9-297:12.)

ALJ Wedekind also stated that with respect to the ruling on sanctions that the Respondents would be permitted to put on secondary evidence, however, that he would listen to objections to particular evidence that was offered. (TR 71:9-15.)

F. TRIAL AND DECISION

The trial in this matter was held in a hearing before ALJ Wedekind on April 30, 2013, and resumed on June 10-12, 2014.

1. UHW Complied With The ALJ's Order And Produced Responsive Documents To Items Nos. 17, 19, 24, 25, 28, 29, 34, 35, 64, 65, And 80 Of The Subpoena To UHW

At trial, UHW complied with the ALJ's April 29, 2013 Order and produced documents in response to several of the subpoena requests. For example, in response to subpoena request no. 17, seeking documents concerning the relationship between UHW and SEIU, the SEIU's involvement in the affairs of the Union, or the Union's invovlement in the affairs of SEIU, UHW produced the constitution and bylaws of the International Union and of UHW. (TR 26:1-6.) Counsel for UHW represented that these were the only responsive documents UHW had in response to item No. 17. (TR 26:6-11.) Likewise, in response to item no. 19 seeking information concerning the UHW's relationship with SEIU Local 121RN, UHW stated that there were no other responsive documents other than the constitution and bylaws which UHW produced, and that those were the only responsive documents. (TR 26:13-19.) Item no. 24 sought documents concerning money, funds or other compensation or payment to Local 121RN, and item no. 25 sought similar information from 121RN to UHW. Counsel for UHW represented that after a diligent search, there are no responsive documents that exist of UHW making payments to 121RN. (TR 27:1-3.) UHW produced documents with respect to payments from 121RN to UHW. (TR 27:3-5.)

Additionally, UHW produced documents with respect to negotitations and terms set forth in the collective bargaining agreement, responding to item nos. 28, 34, 29, and 35.[4] (TR 27:6-8.)

In response to item no. 64 seeking documents concerning any agreements, but excluding any local collective bargaining agreements between or among UHW and Kaiser, UHW produced to Respondents the national agreement between UHW and Kaiser and the national agreement between the Coalition of Unions (which UHW is a member of) and Kaiser and represented that those were the only documents in UHW's possession responsive to the subpoena. (TR 27:13-25.) In response to item no. 65, UHW represented that no documents existed other than the national agreements which were produced. (TR 28:1-7.)

Item 80 sought documents concerning various obligations between the Union or the Coalition of Unions pursuant to the LMP. The Union represented that after a diligent search, the Union provided various documents regarding the Labor Management Partnership within its custody, possession or control; and further represented that the Union did not have any other responsive documents other than those that are also available publicly online. (TR 29:9-17; 29:20-23.) Moreover, the LMP is a separate entity autonomous to UHW. (TR 29:18-19.) Likewise, the Coalition of Unions is a separate entity autonomous to UHW. (TR 29:19-20.) Respondents issued a subpoena to non-party SEIU but did not issue any subpoena to the LMP or the Coalition of Unions.

Accordingly, because UHW substantially complied and produced responsive documents, the Board should disregard Respondents' exaggerated claims that UHW enaged in "subpoena misconduct" or in any "dishonest refusal to comply". (Respondents' Opening Brief at pp. 3-5.)

2. UHW Substantially Complied With Subpoena As To The Items That UHW Specifically Denied Existed And Respondents Have Not Shown Otherwise

In response to various items subpoenaed by Respondents, UHW specifically denied on the record that certain documents existed. Indeed, UHW specifically denied that any responsive documents existed responsive to item nos. 66, 69, 76, 77, 78, 79, seeking

[4] These requests to UHW were similar to requests nos. 26, 27, 32 and 33 in the subpoena to Richard Ruppert. (TR 27:9-12.)

documents reflecting payments from Kaiser to UHW, the Coalition, or the LMP; documents concerning ownership by UHW or any of its affiliates of any shares of Kaiser, Kaiser Federal Bank, or Kaiser Federal Financial Group, Inc.; and documents concerning any efforts by UHW to market or advertise the services of Kaiser. (TR 28:8-25; 29:1-8.) Because UHW substantially complied with these requests by providing responses, the ALJ should apply the holding in *Paint America Services., SRS Group, Inc., etc.*, 353 N.L.R.B. 973 (2009), which finds that the adverse inference only applied to documents the Respondent *did not specifically deny existed*. *Id.* at 989. As such, the adverse inference sanctions or secondary evidence sanctions should not apply to any issues concerning ownership interest in Kaiser (No. 69); or to any issues related to payments from Kaiser to UHW, the Coalition or the LMP (Nos. 66, 76-78); or as to any issues concerning efforts by UHW to market or advertise Kaiser (No. 79.) because the Union denied the existence of any documents responsive to these requests.

Moreover, Respondents did not show that UHW failed to comply, beyond what admitted to. The only items that UHW refused to comply with were as to items 42 – 52, 54, and 70 in the subpoena issued to UHW (and the identical requests in the subpoena issued to Dave Reagan) related to requests concerning UHW's protected union and organizing activities. (TR 29:24-25.)

When the ALJ asked Respondents how they intended to show that UHW did not comply, counsel for the Respondents stated: "Well, we do have – you know, we have taken up an effort over the last several years to compile our own information based on publicly-available sources." "And through that evidence that we will present this week, we think that we'll be able to establish that there are questions (sic) marks with respect to the positions of UHW." (TR 32:7-14.) Respondents had the ability to call the Union's custodian (or custodians) of records and cross-examine those individuals but chose not to. Why Respondents failed to call the custodian(s) of records is unknown, however, it may be because Respondents knew that they would not be able to prove that the Union's representations denying the existence of this information was false. And, Respondents presented no documentary evidence to prove otherwise. Accordingly, because UHW substantially complied and produced responsive documents, the Board should disregard Respondents' exaggerated claims that UHW enaged in "subpoena misconduct" or in any "dishonest refusal to comply". (Respondents' Opening Brief at pp. 3-5.) The only items that UHW did not

comply with were items 42 – 52, 54, and 70 in the subpoena issued to UHW (and the identical requests in the subpoena issued to Dave Reagan).

3. UHW Produced Responsive Documents To Items Nos. 13, 14, And 15 Of The Subpoena To Dave Regan; And Denied The Existence Of Documents Responsive To Item 16

Respondents issued a sixteen (16) item subpoena to Dave Regan, President of UHW. These items were identical to many of the itemized requests made to UHW.[5] UHW denied that any documents existed responsive to item no. 79 - seeking documents concerning any efforts by UHW to market or advertise the services of Kaiser, (TR 29:4-8), and, request no. 79 to UHW is identical to request no. 16 of the subpoena duces tecum addressed to Dave Reagan. Additionally, UHW provided documents responsive to items seeking information concerning agreements between the LMP, the Coalition and UHW, namely UHW provided national agreements and documents in its possession relating to the LMP.

4. UHW Substantially Complied With The Subpoena Issued To Richard Ruppert.

Respondents stated on the record that they had received documents responsive to Mr. Ruppert's subpoena, had reviewed those documents, and were satisfied that the response was complete. (TR 20:9-11.) In fact several of the requests issued in the subpoena to Mr. Ruppert were identical to many of the requests contained in the subpoena duces tecum issued to UHW. For example, item nos. 26, 27, 32 and 33 of the subpoena to Ruppert were identical to item nos. 28, 29, 34, and 35 to UHW.[6]

5. UHW Complied With The Subpoena Issued To Kim Davis.

UHW substantially complied with the subpoena issued by Respondents to Kim Davis. First, UHW explained to Respondents that no documents existed in response to the subpoena issued to Kim Davis. And, second, UHW produced Kim Davis at the hearing.

It is important to note that Respondents having alleged that one of the acts that supported the disqualification defense included conduct by the SEIU (non-party to this

[5] The ALJ revoked item numbers 7 and 12 of the supboena; and denied the Union's petition to revoke as to items 1-6, 8, and 13-16, which the ALJ found were similar to requests 42-52, 54, 79, and 80 to UHW.

[6] UHW provided responsive documents to item nos. 28, 29, 34, and 35 of the subpoena issued to it by Respondents. (TR 27: 6-12.)

proceeding) having solicited the assistance of an SEIU-UHW bargaining unit employee at Garden Grove, Kim Davis, in 2013, to testify at a public hearing in opposition to Prime's acquisition of two hospitals in Kansas, and despite UHW having produced Ms. Davis pursuant to Respondents' subpoena for personal appearance, Respondents chose not to cross-examine Ms. Davis or call her in their case in chief to testify or be cross-examined with respect to the disqualification defense. Moreover, the non-appearance at the trial by Dave Regan had no impact whatsoever on Respondents' decision not to cross-examine or recall Ms. Davis. In fact, on the first day of the resumption of the trial in this matter, Respondents were informed that Ms. Davis had appeared and was also testifying in the General Counsel's case in chief. (TR 75:9-15.) Because the ALJ ruled that cross-examination would not exceed the scope of direct examination during the General Counsel's case in chief, Respondents stated that Ms. Davis may have to return and may be recalled in the Respondents' case in chief. (TR 75:12-16.)

However, Respondents did not re-call Ms. Davis. (TR 303-304.) And, when UHW raised questions about Respondents not calling Ms. Davis, counsel for Respondents indicated that it was a "litigation decision." (TR 304: 8-20). And, even when the ALJ questioned whether Respondents knew at the time that they released Ms. Davis that Dave Regan would not be appearing, and Respondents said that they did not, Respondents at that time did not make a formal request to recall Ms. Davis. (TR 304:21-23.) Respondents surely could have made such a request at that time, to recall Ms. Davis, and could have made a formal request to the ALJ, but they simply chose not to. UHW should not be sanctioned because of Respondents' "litigation decision" not recall Ms. Davis even after they learned that Dave Regan would not be appearing. UHW substantially complied with said subpoena by producing Ms. Davis, making her available to questioning by Respondents, and provided responses to the subpoena by specifically denying that any documents existed responsive to the subpoena.

6. <u>Posthearing Briefs and Decision.</u>

The parties submitted post-hearing briefs on August 25, 2014. The ALJ issued the decision in this matter ("Decision") on November 13, 2014 finding that Respodnents violated the Act and rejecting the Respondents' affirmative defense.

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III. ARGUMENT

A. THE ALJ CORRECTLY FOUND THAT RESPONDENTS HAD AN OBLIGATION UNDER THE ACT TO CONTINUE THE ANNIVERSARY WAGE INCREASES.

In his decision, the ALJ correctly found that Respondents has an obligation under the Act to continue the anniversary wage increases. The evidence at trial demonstrated that the CBAs between UHW and Garden Grove (JT. Ex. 4), and UHW and Encino (JT. Ex. 3), had identical provisions that provide anniversary wage increases to employees. The ALJ in his decision correctly noted that at the first postexpiration bargaining session Schotmiller, the Respondents' negotiator, agreed with the Union's negotiator, Richard Ruppert, that the anniversary wage increase provisions of the CBAs survived the expirations of the contracts. (Decision at 9:10.) The ALJ also correclty noted that during the next 7 months, Respondents granted anniversary wage increases to certain Garden Grove and Encino employees after the expirations of the collective bargaining agreements. (Decision at 9:14-15; TR. 775:4-12; Resp. Ex. 64.) Thereafter, Shotmiller testified that she reviewed the law and contract language decided that her intiital agreement about continuing to pay the anniversary wage increase was mistaken and ordered that it cease. (Decision at 9: 17-23; TR 566-569, 572, 575, 58, 602.) The ALJ also properly found that the Respondents never gave notice of the discontinuation of the anniversary wage increase to the Union. (Decision at 9:24-26; TR 189:3-13.) In light of these undisputed facts, the ALJ correctly held that "[i]t is well established that such contract provisiosn are a mandatory subject of bargaining and that an employer must continue them in effect postexpiration until the parties have reached either a new agreement or a valid impasse, unless the employer can show tha thte union clearly and unmistakably waived the right to bargain over ceasing them." *See Southwest Ambulance,* 360 NLRB No. 109 fn. 1 and JD at 13-17 (2014), and cases cited there. (Decision at 9: 27-35.)

The ALJ also found that Respondents did not show that there was a clear and umistakable waiver and rejected the Respondents' contractual interpretation arguments. (Decision at 10:1-25.) The ALJ further found correctly that Shomtiller's oral agreement to

maintain the anniversary wage increase and may be binding. (Decision at 10:27-37.) Finally, the ALJ correctly held that under Board law, Respondent Encino's repeated and regularly approved granting of the anniversary wage increases for months after the contract expired, even absent any oral agreement, was sufficient to "prevent Encino from unilaterally ceasing such increases without notice or bargaining with the" Unions. *See Garden Grove Hospital & Medical Center*, 357 NLRB No. 63 (2011) (Decision at 10:39-41; 11:1-5)

B. THE ALJ CORRECTLY FOUND THAT REPONDENTS HAD AN OBLIGATION TO PROVIDE UHW WITH THE REQUESTED INFORMATION ABOUT HEALTHCARE PLANS.

The ALJ correctly found that Respondents were obligated under the Act to to provide information responsive to the Union's January 12 and January 25 information requests seeking information about the Respondents healthcare plans. (Decision at 21.) The ALJ properly concluded that the information Richard Ruppert requested about the healthcare plans were "plainly relevant on their face." (Decision at 21:16-18) Furthermore, the ALJ properly concluded that the Union did not receive the bulk of the information requested. (Decision 21:10-12.)

The ALJ also properly found that the Richard Ruppert fully explained the relevance of the request. (Decision 21:18.)

In response to an email from Mary Schotmiller, Negotiator and In-House Counsel for Respondent Encino, requesting that the Union put all questions in writing, Union Negotiator Richard Ruppert, hand delivered a letter on January 12, 2012 to Schotmiller during a bargaining session requesting information that was relevant and necessary for the Union to continue bargaining over healthcare. (TR 189:14-25; 190:3-20; Joint Exhibit 12.) Ruppert testified that when he delivered the letter to Schotmiller during bargaining, that he went through the questions in the letter and explained that the questions related to the prior bargaining session. (TR 191:10-24.) Schotmiller accepted the letter but gave no response. (TR 192:1-8.)

On February 20, 2012, Schotmiller responded to the Union's January 12th information request via email. (TR 192:9-23; Joint Exhibit 12.) The Union received the requested COBRA costs, the doctors' list, and an updated Form 5500. (TR 192:24-25; 193:1-4.)

Ruppert testified that he did not receive response to the numbered items in his January 12, 2012 letter. (Joint Exhibit 12; TR 193:7-13.)

Thereafter, during a bargaining session on March 20, 2012, Ruppert delivered to Schotmiller another letter explaining the reasons that the Union needed the information requested and in response to Schotmiller's February 20th email. (Joint Exhibit 14; TR 193:14-22; 194:12-25; 195:1-9.) One of the main concerns from the Union's point of view was that the healthcare expert, Ms. Valle, was no longer made available to ask questions as the Union believed that when she was present at bargaining, she was very helpful. (TR 194:25; 195:1-4.) Schotmiller gave no response on March 20th and the Union has not received the information requested. (TR 195:19-25; 196:1-3.)

Similarly, Ruppert delivered a letter to Schotmiller during the January 26th bargaining session at Garden Grove requesting information (the information requested was identical to the January 12th letter to Encino). (TR 203:16-25; 204:1-4; Joint Exhibit 15.) As with Encino, during that bargaining session at Garden Grove, Ruppert walked through the letter with Schotmiller at the bargaining table. (TR 204:15-22.) Schotmiller accepted the letter and did not respond. (TR 204:23-25.) Thereafter, in a letter dated February 20, 2012, Schotmiller, on behalf of Garden Grove, responded to Ruppert's January 26th letter. (TR 205:3-10; Joint Exhibit 16.) In response to the information request directed to Garden Grove, as with Encino, Ruppert received only the COBRA costs, the doctors' list, and Form 5500 from Garden Grove. (TR 205:15-20.) The Union did not receive the bulk of the information requested in either its January 12 information request to Encino or its January 6 information request to Garden Grove.

Ruppert responded to Schotmiller's February 20th letter and delivered it during bargaining at Garden Garden. (Joint Exhibit 17; TR 205:21-25; 206:1-16.) Ruppert went over his response orally at the bargaining table with Schotmiller and the bargaining team. (TR 206:17-25.) Ruppert testified that he explained why the information that the Union was asking for was relevant to the issues raised by the bargaining team and the discussions that the

Union had with the membership, and explained why the Union needed responses to these questions. (TR 207:1-4.) Schotmiller did not respond but accepted the letter. (TR 207:5-7.) As with the information request to Encino, the Union received no response from Garden Grove to the Union's March 28, 2012 letter. (TR 207:8-20.) In fact, at the bargaining in April 2012, Schottmiller said there was no response forthcoming. (TR 207:17-20.) The Union never received a response to the numbered items in Joint Exhibit 15. (TR 207:21-25.) Accordingly, the ALJ properly found that Respondents violated the Act by not providing the information.

On cross-examination of Mr. Ruppert, Respondent attempted to show that the Union already possessed the information requested prior to the issuance of the January 12 and January 26 information requests. Respondents' attempted this first by introducing irrelevant responses to Union information requests from 2010 and next by referring to the summary plan document ("SPD"). (Respondent Exhibit 46; Respondent Exhibit 37; TR pp. 209-218.) Despite these attempts, Respondents failed to prove that the Union issued information requests to harass. (TR 217:1-25; 218:1.) For example, in response to questions from ALJ Wedekind, Mr. Ruppert explained why the SPD did not respond to the question in No. 2 in Joint Exhibits 12 and 15. (TR 219:10-19.) Indeed, Joint Exhibits 13, 14, 16, and 17 describe in detail why the Union believed that the SPD did not sufficiently respond to the Union's information request and the Union communicated those reasons to the Respondents. (TR 253:9-24.)

Similarly, in response to question on cross-examination concerning question No. 6 in Joint Exhibits 12 and 15 regarding the EPO plans, Ruppert explained what costs in the EPO plan the Union was looking for. (TR 224:8-11; 225:2-25; 226:1-25; 227:1-2.) Ruppert further explained that the questions were directly related to the discussions the parties had at bargaining with the healthcare expert, Ms. Valle. (TR 227:3-4; 8-16.) Ruppert testified that rather than responding to the information request, the Respondent's questioned the Union's

motives for making the requests. (TR 227:16-24.) Ruppert further testified that his response to the Respondents was to say:

> These are information requests, based upon bargaining discussions, based upon discussions across the bargaining table. And the purpose of asking for these clarifications is for bargaining purposes. Not for any other.

(TR 227:23-25; 228:1-4.)

Ruppert further testified and explained why he believed the Union had not received a response to Question No. 6 in Joint Exhibits 12 and 15. (TR 228:22-24; 229:1-16.) He stated:

> My question is, what are the actuarial data and the premium costs, etc., that were used to determine the premiums . . . our question was 'what did you look at? What determination was made?' so that we could get inside the costs in case we had to make bargaining purposes to move costs around.

(TR 229:1-7.) Ruppert further stated: "These are questions that . . . are just probing to find where I can move in the purpose of bargaining to get a bargaining settlement." (TR 229:8-12.)

Even when Respondents' counsel attempted to question Ruppert's motives for issuing the information requests, Mr. Ruppert testified credibly that his "attempt was to fashion questions driven by bargaining at the bargaining table, with the bargaining team, based on discussions with bargaining team to get an agreement at the hospitals." (TR 230:25; 231:1-3.) Ruppert again explained the reasons in detail for requesting the information. (TR 231:4-25; 232:1-2.)

The ALJ, based on the evidence presented at trial, correctly found that Respondents "failed to establish a legitimate basis for not providing the information requested by Ruppert." (Decision 21:20-21.) Based on the facts and evidence presented at trial, the ALJ also correctly rejected the Respondents assertions that the information was not relevant or necessary for UHW to present a bargaining proposal because Respondents had already provided UHW with the SPD's and made Valle available to answer questions during bargaining sessions. (Decision 21:21-24.) The ALJ correctly held that Respondents did not contend that the SPD's and Valle had provided all of the information requested by Ruppert

and that Ruppert's March 20 response to Schottmiller fully explained why the additional information remained relevant and necessary. (Decision 21:24-26.) Therefore, the ALJ properly held that under these circumstances "Respondents could not simply ignore Ruppert's request, but were required to comply with the request to the extent it encompassed additional relevant and necessary information that had not already been provided." *See Mission Foods,* 345 NLRB 49 at 789 (2005); and *Keauhou Beach Hotel,* 298 NLRB 702 (1990), and cases cited there. (Decision at 21:27-30.)

Finally, the ALJ properly rejected the Respondents' argument that the requested information was confidential and proprietary. (Decision 21:32-36.) The record is void of any evidence that Respondents ever raised the issue of confidentiality with respect to the Union's information request nor did Respondents seek an accommodation from the Union. Thus, Respondents Exceptions should be dismissed.

C. THE ALJ CORRECTLY REJECTED THE RESPONDENTS' DISQUALIFICATION DEFENSE.

The ALJ correctly rejected Respondents' affirmative defense that they lawfully ceased the anniversary wage increases and refused to provide UHW the information requested because UHW was disqualified from representing the unit employees due to its participation in the Coalition of Unions Labor Management Partnership ("LMP") with Kaiser and UHW's "corporate campaign to disparage Prime's reputation". As a preliminary matter, the ALJ correctly found that Respondent failed to prove that the alleged disqualifying conduct "had anything to do whatsoever with Respondents' alleged unlawful actions." (Decision at 22:1-3.) The evidence presented at trial demonstrated that Respondents ceased the anniversary wage increases based on their interpretation of the contract and that they did not provide the information requested to UHW because they did not believe it was relevant or necessary to bargaining. (Decision at 22:3-7.) Furthermore, as the ALJ correctly held, there is no evidence in the record that Respondents ever "actually asserted that UHW was disqualified from representing the unit employees" and no evidence that Respondents ever communicated to

UHW that by virtue of the disqualification they would not bargain with the Union. (Decision at 22:8-13.) Rather, the evidence demonstrates that Respondents recognized UHW as the exclusive bargaining representative of the employees employed at Encino and Garden Grove nearly six years ago and for the last three years bargained with UHW over a successor collective bargaining agreement. Based on these facts, the ALJ correctly held that Respondents could not now assert as a defense to the "discreet 8(a)(5) allegations in this proceeding that they never had to recognize and bargain with UHW in the first place."[7] Furthermore, Respondents did not show that they had suspended bargaining with the Union as was the case in *Bausch & Lomb*. (Respondent's Opening Brief at 42.)

The ALJ also properly found that Respondents failed to meet their burden of proof as to this defense.[8] (Decision at 21:40-44.) Respondents failed to establish under Board law that UHW's conduct disqualified it from representing the employees at Encino and/or Garden Grove. As the ALJ properly found, Respondents failed to prove the defense. (Decision at 23:1-2.) The ALJ correctly noted that "[i]t is the employer's burden to prove the affirmative defense, and the burden is a heavy one. *Supershuttle International Denver, Inc.*, 357 NLRB No. 19, slip op. at 2 (2011), citing *Garrison Nursing Home*, 239 NLRB 122 (1989)." (Decision at 23, n. 33.)

For example, Respondents did not establish that UHW engaged in any conduct to eliminate or dissolve the bargaining units it represents at Encino or Garden Grove and there are no facts to show that UHW has engaged in any conduct or taken any action to eliminate or dissolve the Encino or Garden Grove bargaining units. Similarly, Respondents did not

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[7] In its posthearing brief, UHW argued that Respondents had waived the disqualification defense based on many of the same facts that the ALJ relied upon to find that Respondents could not now assert the disqualification defense.

[8] While UHW argued that the ALJ should disregard and/or give little to no weight at all to any evidence presented by the Respondents of alleged conduct by UHW towards any entity that is not a party in these proceedings, the ALJ considered non-party evidence. For example, ALJ Wedekind considered conduct by UHW directed at Prime (an entity that Respondents' have described to be a "parent company" of Encino and Garden Grove) in considering whether Respondents had satisifed the disqualification defense.

establish that UHW is a business competitor in direct competition of Encino or Garden Grove and UHW did not and has not engaged in such conduct. Likewise, Respondents did not establish that UHW took any action or engaged in any conduct that did not protect or advance the interests of the employees in the bargaining units at Encino and Garden Grove. These facts were not presented at hearing because they simply do not exist. Furthermore, none of the evidence presented, such as UHW's labor-management partnership with Kaiser, or UHW's criticism of Prime, or UHW's organizing activities, justified extending the disqualification defense to a new set of circumstances or conduct that does not already exist under current Board law.

Finally, as the ALJ correctly held, UHW's conduct is nothing more than union and protected activities that serve the Union's legitimate interests and Respondents cannot establish a disqualification defense based on such conduct. *Montauk Bus Co.,* 324 NLRB 1128, 1136-37 (1997) (union's solicitation of school district to cancel nonunion employer's contract and reassign work to union contractor was protected and did not create a disabling conflict of interest); *see generally Aztech Electric Co.,* 335 NLRB 260, 270 (2001) (Members Liebman and Walsh, concurring)(discussing the wide scope of protected activity in relation to the narrow scope of the "disabling conflict" defense.) Therefore, the ALJ properly rejected Respondents' disqualification defense and the Board should deny and dismiss Respondents' Exceptions.

1. Respondents Did Not Present Any Facts To Substantiate The Disqualification or Conflict of Interest Defense

The Board has held that where a "conflict of interest exists on the part of the union such that good-faith collective bargaining between the union and the employer could be jeopardized," the union may not represent the employees. *CMT, Inc.* 333 NLRB 1307 (2001), *citing Bausch & Lomb Optical*, 108 NLRB 1555 (1954). However, the Board makes such conflict of interest findings only in unique circumstances. "In order to find that a union has a disabling conflict of interest the Board requires a showing of a 'clear and present' danger

interfering with the bargaining process." *Supershuttle Int'l Denver, Inc.,* 357 NLRB No. 19, slip op. at 2 (2011); *see also CMT, Inc.* 333 NLRB 1307 (2001) *citing Garrison Nursing Home*, 239 NLRB 122 (1989), citing *Quality Inn Waikiki*, 272 NLRB 1, 6 (1984), enf'd. 783 F.2d 1444 (9th Cir. 1986). As explained above, the Board imposes a "heavy burden" on any employer bringing such an affirmative defense. *Id.* n. 6 ("Imposing a heavy burden is justified because, otherwise, we would unduly be restricting employees' right to representation by the bargaining agent of their choice. The choice is not to be lightly frustrated. There is a considerable burden on the nonconsenting employer, in such a situation as this, to come forward with a showing that danger of a conflict of interest interfering with the collective-bargaining process is clear and present. *NLRB v. David Buttrick Co.,* 399 F.2d 505, 507 (1968).") And, "[a]n alleged conflict of interest must be proximate and substantial, not remote and speculative." *Greyhound Lines, Inc.,* 319 NLRB 554, 557 (1995).

Here, none of the evidence presented by Respondents through the course of the three-day hearing established that UHW had a conflict of interest that disqualified it from representing employees at Encino and Garden Grove. Even applying the adverse inference and secondary evidence sanctions, Respondents failed to meet their burden of proof. Indeed, none of the alleged conduct falls into any of the unique categories of acts held by the Board to disqualify a union based on a conflict of interest. And, the ALJ correctly held that none of UHW's conduct, taken individually or as a whole, disqualified it from being the Encino and Garden Grove bargaining unit employees' representative.

In *Bausch & Lomb Optical Co.,* 108 NLRB 1555 (1954) the first narrow circumstance to apply this doctrine, the Board found that where a union established a business enterprise in the same locality and industry as that of the employer, and therefore became one of its *direct* competitors, the union could not continue to represent the employees and the employer did not have an obligation to bargain. In making its ruling, the Board held: "We conclude, therefore, that the particular circumstances of this case warrant exercise by the Board of its authority to determine that while the Union retains it (sic) dual status of bargaining agent and business

competitor it is not a proper representative of Respondent's employees for the purpose of invoking Section 8(a)(5) of the Act." *Id.* at 1562. The Board, however, also made it explicitly clear that the holding was limited to the facts of the case, stating "[w]e hold only that, under the facts of this case, which we regard as unique, the Union cannot perform its statutory function as bargaining representative if simultaneously it is an immediate business competitor of the particular employer whose employees it purports to represent." *Id.*

Thereafter, in *CMT, Inc.*, 333 NLRB 1307 (2001), the Board reiterated that "the Board's 'conflict of interest' originated to address the 'unique' circumstances where a union is in direct *business* competition with the employer whose employees it represents." *Id.* at 1308. In applying the conflict of interest theory, the Board noted that a "situation (involving a union as a direct competitor) is a far cry from" a situation like was present in *CMT* "where a conflict is alleged to arise because the union *represents* employees of different companies who have a business relationship with each other." *Id.* The Board further held:

> Needless to say, this situation is far from unique. Unions typically represent not only employees of companies doing business with each other, but also employees of direct competitors in the same industry. Surely, this situation does not present such an 'innate danger' to the bargaining process that the Board could justify limiting employees' statutory right of free choice. To hold that an employer can refuse to deal with a union simply because that union also represents employees of a company doing business with the employer would improperly extend the conflict-of-interest doctrine far beyond its purpose.

Id.

In *CMT, Inc.*, the Board also noted that there are only two cases in which the Board found a conflict of interest where the union represented employees of both the employer and its subcontractor, citing *Catalytic Industrial Maintenance Company*, 209 NLRB 641 (1974), and *Valley West Welding Co.*, 265 NLRB 1597 (1982).[9] In both of those cases, the Board

[9] In *Valley West Welding Co.*, 265 NLRB 1597 (1982), the Board excused the employer's withdrawal of recognition from the union, which represented employees performing work under a subcontract with Consolidated Aluminum Corporation (Conalco), after the union, which also represented Conalco employees performing the same work, obtained Conalco's agreement to limit the subcontracting, thus resulting in a loss of work for the employer's employees. *Id.* at 1603.

emphasized that the "union had committed an 'overt act' showing that it was working at cross purposes with its duty to represent the subcontractor's employees and thus presenting a proximate danger of infecting the bargaining process." *CMT, Inc., supra.*

In *Catalytic Industrial Maintenance Company,* 209 NLRB 641 (1974), the second circumstance in which the conflict of interest was applied, Catalytic filed a petition to revoke certification of representative. The Board revoked the certificate of representative finding that the union had "created a proximate danger of infection of the bargaining process" when it "demonstrated a purpose to work for the dissolution of the certified unit". *Id.* at 642. The Board found that the "overt act" the union committed was the distribution of a leaflet to its members "at the Oxochem jobsite and to other members at other petrochemical complexes in the area, which leaflet set forth the latest union demands upon Oxochem, including the initial and the revised demand for an increased in-house maintenance force." *Id.* at 646. The Board found that "had the union position prevailed, Catalytic's continuance as a subcontractor doing maintenance work on the Oxochem jobsite would have been placed in serious jeopardy, and Catalytic's elimination from the Oxochem jobsite would have been a strong likelihood." *Id.*

Respondents presented no evidence to show that UHW engaged in any conduct to eliminate or dissolve the bargaining units it represents at Encino or Garden Grove as required by the Board in *Catalytic Industrial Maintenance Company*, 209 NLRB 641 (1974). To the contrary, UHW has and continues to represent its members employed at Encino and Garden Grove and continues to bargain with the employers for a successor contract. The testimony of Union Negotiatior, Richard Ruppert, and the underlying unfair labor practice proceedings demonstrate that UHW has continued to represent the bargaining unit and is advancing the interests of the members. Respondents presented zero evidence to show that UHW took any action or engaged in any conduct that did not protect or advance the interests of the employees in the bargaining units at Encino and Garden Grove. Respondents' Exceptions and brief in support of its Exceptions are based on speculation and conjecture, but not based on facts. Accordingly, the ALJ's ruling was correct.

Second, Respondents did not allege that UHW is a business competitor in direct competition of Encino or Garden Grove as required by the Board in *Bausch & Lomb Optical Co.*, 108 NLRB 1555 (1954). UHW is a local labor union that represents healthcare workers throughout the State of California and it does not and has not engaged in any such manner as a

business competitor of Encino or Garden Grove. Nor does UHW have any ownership interest in Kaiser Permanente. In response to Respondents' subpoena duces tecum, UHW represented to Respondents and on the record at the hearing that no documents existed with respect to the requests concerning any ownership interest in Kaiser Permanente.[10] (TR 28:8-25; 29:1-3.) Thus, Respondents' Exceptions should be denied.

2. The ALJ Correctly Found That Respondents Failed To Prove That The Labor Management Partnership Trust With Kaiser Supports The Disqualification Defense

The ALJ correctly held that Respondents' failed to meet the burden of proving the disqualification defense based on their reliance on UHW's collective bargaining relationship with Kaiser and the labor-management partnership with Kaiser. (Decision at 23-24.) The labor-management partnership ("LMP") is a trust that was formed pursuant to the Labor-Management Cooperation Act ("LMCA") of 1978, 29 U.S.C. § 173(e), 175a, 186(c)(9) ("LMCA"). As the ALJ properly noted, labor-management partnerships to enhance employer competitiveness are encouraged under the LMCA. (Decision 23:7-8.) And, while the ALJ opined that the LMP might stretch the purposes and policies of the LMCA, the ALJ correclty noted that Respondents failed to "even acknowledge, much less address," the LMCA. (Decision at 23: 25-34.) The ALJ noted:

> The Respondents failure to address the Labor Management Cooperation Act is remarkable not only becaue UHW has repeatedly cited it as grounds for rejecting Respondents' disqualification/conflict-of-interest defense (see e.g., GC Exh 1(eee)), but becaue it was one of the grounds cited by the federal district court for dismissing Prime's amended complaint in the antitrust case.

(Decision at 23, n. 36.) Respondents' claims in its Opening Brief in support of its Exceptions that it has addressed this very issue is completely false and should be disregarded by the Board.

[10] Prime's supboena duces tecum to UHW at requests nos. 66, 76-78, and 69 seeking documents reflecting payments from Kaiser to UHW, the Coalition or the LMP, and documents concerning the ownership interst by UHW or its affiliates in any shares in Kaiser. Counsel for UHW responded to these requests indicating that no responsive documents exist. (TR 28:8-25; 29:1-3.)

The ALJ also correctly held that Respondents cite to no authority disqualifying a union because of labor-management partnership with a competitor. (Decision at 24:1-2.) Indeed, there is absolutely no case law that supports a disqualification defense based on the existence of a labor-management partnership turst or cooperative relationship with an employer. *See Universal Fuels, Inc.*, 270 NLRB 538 (1984) (rejecting the employer's conflict of interest defense and finding no merit in the argument that the union had a "definite financial stake to force Respondent out of business" based on its bargaining demands.); *see also Greyhound Lines, Inc.*, 319 NLRB 554, 557 (1995) (Striking the employer's affirmative defense where the employer alleged that the union attempted a "hostile take over of the Respondent" through the union's "employee stock ownership program".)

For example, in *Supershuttle Int'l Denver,Inc.* 357 NLRB No. 19, slip op. (2011), the Board rejected the claim that a union's affiliation with a taxi cooperative, pursuant to which the union provided various representational services in exchange for regular per capita payments from the cooperative, disqualified it from representing employees of an alleged competitor of the taxi cooperative:

> Even assuming the taxi drivers who are members of the UTC are direct competitors of the Employer, we do not believe that that fact would disqualify the Union from representing the Employer's employees. After all, unions commonly represent employees of multiple employers in the same industry, often in the same competitive market. *The fact that expansion of one such employer, and the union's consequent gain of members, may come at the expense of another employer in the same market, does not disqualify the union from representing the employees of both employers.*

Id. at slip op at 3(emphasis added). Following *CMT, Inc.* and *SupershuttlCe Int'l Denver*, it is evident that UHW's relationship with Kaiser does not establish the disqualification defense. Respondents' disqualification defense was properly rejected because there is no evidence that a conflict of interest exists between UHW and Encino or Garden Grove and any alleged conflict of interest "is speculative and does not present a 'clear and present' danger" of interfering with the bargaining process. *CMT, Inc.*, 333 NLRB No. 1307, 1308 (2001). And, while it is true that UHW represents employees of many different hospitals throughout the state, including employees of the Respondents and employees of Kaiser, these facts do not support the disqualification defense. "Unions typically represent not only employees of companies doing business with each other, by also employees of direct competitors in the

same industry." *CMT, Inc.* 333 NLRB1307, 1308 (2001). In *CMT*, the Board refused to find that this situation of a union representing employees of direct competitors presented an "innate danger" to the bargaining process. *Id.*

Indeed, there is not a single Board decision that supports the diqualification defense based on the existence of a Labor Management Partnership. And, Respondents' Exhibits 93, 95, 96, 89D,97, 98, 102, 435, 438, 93, 819, and 820 concerning the Partnership with Kaiser, or Schottmiller's testimony that Prime's "concern was that SEIU UHW in their relationship with Kaiser is to - - is to exclude direct competitors from the California healthcare market" (TR 516:12-23), do not support expanding the disqualification defense to apply to labor management partnerships. Congress specifically authorized untions to enter into labor management partnerships like the LMP for purposes of "improving labor management relationships, job security, organizational effectiveness, enhancing economic development or involving workers in decisions affecting their jobs including improving communication with respect to subjects of mutual interest and concern." 29 U.S.C. § 175a(a)(1)B). It is highly unlikely that Congress allowed for such partnerships between unions and employers, only to have those very same partnerships effectively bar unions from representing employees of employers in the same industry, or to prevent unions and employers in such partnerships from working together to effectuate the purposes of the statute – like "enhancing economic development".

For example, the Board rejected a claim similar to the one that Respondents raise here with respect to the UHW's strategic partnership with Kaiser. In *Roadway Package System, Inc.,* 292 NLRB 376 (1989) *aff'd* 902 F.2d 34 (6th Cir. 1990), the employer, in defense to a Section 8(a)(5) allegation, offered to prove a Teamsters local had a disqualifying conflict of interest as a result of its pre-existing alliance with United parcel Services, the employer's chief competitor. According to the employer, the union's "representational competency is disabled not by a business or institutional relationship with an employer, but rather by a pre-existing alliance or conspiracy between itself, its international union and Respondets' chief competitor in the industry, [UPS]." *Id.* at 426. The goal of the alleged alliance was to organize UPS's competitors and force them to accept UPS-type contract conditions, or force them out of business. *Id.* The ALJ found, however, that employer's "offer of proof does not purport to establish that Local 299 is constrained by its relationship with the International

Union and UPS to engage in bargaining calculated dto put Respondent out of business regardless of what the concessions Respondent might make in bargaining." *Id.*

The ALJ, affirmed by the Board, stated: "[i]t appears that the objective of preserving the jobs of employees already represented by Teamster unions by organizing and seeking to uplift the wages and benefits of nonunion employer competitors carries with it an inherent conflict of interest. I know of no Board precedent or legislative history of the Act that wouldd support this position." *Id.* at 427. Like the ALJ found in *Roadway Package System*, "[t]here is no evidence showing that the evidence would reveal that the intersts of the unit employees would necessarily be subverted by the Teamsters' bargaining goals which of incidental necessity benefit UPS and UPS unionized employees." *Id.* Likewise, here, despite the many documents that Respondents have introduced in this hearing, including the National Agreements, LMP documents and the Action Plan (higlighting the following language: "[f]ocus our respective consitutencies on real external threats – competition, public policy and financing changes, the economic crisis and high unemployment, etc."), or the May 2014 CHA agreement, and even applying an adverse inference, Respondents did not show that UHW was not working in the best interest of the employees at Encino or Garden Grove. Furthermore, there was no evidence presented that UHW wants to run Encino or Garden Grove out of business. Therefore, the ALJ properly held that the strategic partnership with Kaiser did not suppport the disqualification defense. Accordingly the Board should deny Respondents' Exceptions.

3. The ALJ Correctly Ruled That There Was Nothing Disqualifying About UHW'S Alleged Campaign Of "Attacks", "Hostility" And "Disparagement"

The ALJ properfly held that Respondents failed to establish that UHW's "corporate accountablity campaign" against Prime supported the disqualification defense. (Decistion at 24:4-5.) As the ALJ correctly noted, "[p]ublic campaigns to pressure an employer to accede to employee bargaining demands are nowthing new." (Decision at 24:5-6.) citing *See e.g., Rochester Telephone Corp.*, 333 NLRB 30 (2001) (union engaged in corporate campaign to pressure employer to modify its last bargaining proposal). The ALJ also held: "And, within certain bounds, they are protected by the Act." *Id. at* 24:8-9 citing *See Jimmy John's*, 361 NLRB No. 27 (2014); *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007) enfd.

358 Fed. Appx. 783 (9th Cir. 2009); and *Montauk Bus Co.,* 324 NLRB 1128 (1997), "and cases cited there."

Furthermore, relying on the evidence presented at trial, the ALJ also correctly found that although UHW's press releases and reports were highly critical of Prime, "they addressed matters plainly relevant to unit employees' terms and conditions of employment." (Decision at 24:13-17.) And, as the undisputed evidence demonstrated, the ALJ also found that the UHW reports and press releases "specifically stated that the Union was involved in labor disputes with Prime and explained the relationship or connection between those labor disputes and the concerns raised in the reports." (Decision at 24: 17-19.)

Board law supports the ALJ's decision. First, UHW's use of economic weapons is within the bounds of good faith bargaining. *See NLRB v. Insurance Agents' Int'l Union,* 361 U.S. 477, 488-89 (1960)("The presence of economic weapons in reserve, and ther actual exercise on occasion by the parties, is part of the system that the Wagner and Taft-Hartley Acts have recognized."); *Edir Inc. d/b/a Wolfie's,*159 NLRB 686, 694-5 (1966)("A typical labor dispute . . . is more than a friendly match. The contestants are allowed considerable discretion in selecting economic weapons . . .[and the union's weapons] may be highly prejudicial to the employer in loss of image or income. . . ."); *see also Universal Fuels, Inc.,* 270 NLRB 538, 540 (1984)(rejecting conflict of interest defense and noting that the "basic frame of reference is not an economic vacuum in which the collective-bargaining representative of employees . . . and the employer . . . bear a bland and tensionless relationship to each other. On the contrary, their interests are to a large extent adversarial.") For example, strikes and boycotts are economic weapons that are expressly designed to damage an employer's business until it accedes to a union's demands and are bedrock Section 7-protected activities. *See NLRB v. Eeire Resistor Corp.,* 373 U.S. 221, 233-34 (1963); *Coors Container Co.,* 238 NLRB 1312, 1318-19 (1978); *see also In Re W.D.D.W. Comm. Sys. & Invs., Inc.,* 335 NLRB 260, 269 (2001) Liebman and Walsh, concurring)("To level the playing field between employeers and workers, the Act protects a wide range of concerted activity by employees, even though it may be in sharp conflict with the economic interests of individual employers or of employers as a class. Needless to say, there is nothing 'disabling' about this conflict."); *Geo. A. Hormel & Co.,* 301 NLRB 47, 80 (1991)(recognizing employee's

advocacy of boycott of employer to express sympathy for striking workers in protected activity even where it causes employer's "loss of image or income.")

Second, there is not one case under Board law holding that the sort of campaign alleged to have taken place warrants the extreme remedy of disqualifying a union from representing bargaining unit employees. Indeed, the evidence Respondents' introduced reflecting UHW's conduct and its "campaign of hositlity" against Prime is nothing more than a typical portrait of a labor organization engaged in protected Section 7 activity. None of the evidence Respondents introduced through the course of this hearing concerning UHW's "attacks" against Prime satisifies the heavy burden of establishing the disqualification defense. (Resp. Exhs. 3, 105, 201, 202, 203, 204, 206, 91, 92, 208, 209, 210, 213, 214, 215, 216, 217, 218, 222, 222-A, 222-B, 240, 254, 502, 537, 782, 750 (aa).)

Thus, relying on Board law, the ALJ correctly found that Respondents failed to show that the UHW reports published and widely circulated concerning quality of care at Prime's hospitals and related conduct to prevent Prime from acquiring hospitals "exceeded the bounds of protected conduct." (Decision at 24:23-24.) For example, Prime introduced evidence of three reports circulated by UHW: (1) information about Prime's fraudulent and overbilling of Medical and Medi-Care; (2) a report on Septicemia at Prime Hospitals; and (3) a UHW report on Care and Coding at Prime Hospitals.[11] As to the UHW report about "Septicemia at Prime Hospitals", Schottmiller testified that Respondents were concerned that the report was "false, disparaging, and an attempt to smear or otherwsie destroy the reputation of Prime Healthcare." (Resp. Ex. 91; TR 365:2-22.) In addition to the reasons cited by the ALJ, this conduct does not support the disqualification defense and "false, disparaging" statements about an employer with whom the Union has an on-going labor dispute is protected speech and does not constitute conduct to support the disqualification defense. In fact, page 3 of the

[11] UHW contends that these reports undeniably constitute protected speech under the Act. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978); *Misericordia Hospital Medical Center v. NLRB*, 623 F.2d 808, 813 (2d Cir. 1980)(patient welfare and working conditions are often "inextricably intertwined"); *Valley Hosp. Med. Ctr.*, 351 NLRB 1250, 1252 (2007)("[Employees' statements regarding patient care and/or staffing levels have been found protected where it was clear from the context of the statements that they related to a labor dispute and/or employees' terms and conditions of employment.").

Septicemia Report describes that UHW "is engaged in a labor dispute with Prime". (Resp. Ex. 3 at p. 3.) *See Valley Hosp. Med. Ctr.,* 351 NLRB at 1252. Even applying the adverse inference to this report due to UHW's failure to provide responsive documents or failure to produce Dave Regan, the fact that the Union authored and issued this report criticizing Prime's high septicemia rates at its hospitals did not meet the heavy burden for the disqualification defense.

Respondents also introduced a UHW Care and Coding at Prime Healthcare Services report dated January 2011 (Resp. Ex. 92) to show that UHW continued in its "disparagement of Prime Healthcare hospitals" and that the report contained false allegations and "what Sarrao considered to be skewed statistics in the report". (TR 385:2-17; Resp. Ex. 92.) The report on its face shows it was created by UHW. The hearsay statements by Sarrao do not prove that the report was false, skewed or disparaging. Even applying an adverse inference, again, at most this document shows that UHW was critical of Prime's services, activity and speech protected by the Act – and not grounds to support a disqualification defense. With respect to the reports, the ALJ properly found that "the reports relied on publicly available Medicare data, and there is no contention or evidence that UHW misreported that data." (Decision 24: 24-26.) The ALJ also correctly held that "[a]s for the reports' conclusions, Respondents never established that they were incorrect." (Decision 24:26-27.)

Respondents introduced hundreds of exhibits to prove the alleged campaign of "hostility and disparagement" against Prime, none of which supported the disqualificaiton defense. For example, to prove that UHW accused Prime of alleged overbilling of Medicare and Medi-Cal, Respondents introduced a letter dated May 26, 2010 (pre-dating the January 2012 information requests and 2011-2012 elimination of the anniversary wage increases) to Dave Regan from Governor Brown confirming receipt of a packet of information including "PowerPoint slides and two UHW-generated pieces" about Prem Reddy and Prime Healthcare. (Resp. Ex. 202; TR 347 – 349:8.) The letter confirmed referral of the matter to a Special Agent to investigate whether Medicare is being paid on falsified or fraudulent claims

from Prime Healthcare. (Resp. Ex. 202.) Respondents also introduced a July 1, 2010 letter from House Representatives Stark and Waxman to the U.S. Inspector General concerning an "SEIU report" that they received regarding Medicare billing and high septicemia rates at Prime Healthcare Services, Inc. (Resp. Ex. 204; TR 354:21-25; 355 – 356:20.) As discussed, this conduct is evidence of nothing more than protected speech under the Act. *See Eastex, supra; Misericordia, supra; Valley Hosp. Med. Ctr., supra.*

Indeed, it appears that the crux of Respondents' disqualification defense is based UHW engaging in alleged "false and disparaging attacks" of Prime based on the Septicemia report (Resp. Ex. 91) and the Care and Coding Report (Resp. Ex 92). As discussed, false and disparaging statements made by a union do not constitute conduct that has been deemed to disqualify a union from representing bargaining unit employees.[12] And, as explained above, these reports are protected speech and did not require the ALJ finding that the Union is disqualified from representing the employees based on these reports. But, assuming for argument's sake that false or disparaging statements did constiute disqualifying conduct (which they do not), Respondents failed miserably to show that UHW's reports are in fact "false". Furthermore, as the ALJ found, the testimony of Respondents' expert witness, Dr. William Bishop Fairley ("Dr. Fairley"), likewise did not show that UHW's Septicemia report was false or that the Care and Coding Report was false. (Decision at 25:1-13.)

In fact, Dr. Fairley could not even answer that question when posed to him by ALJ Wedekind. The ALJ asked: "Did you reach a conclusion as to whether - - let's start with the septicemia report. Did you reach any kind of conclusion based on your expertise in reviewing these kinds of things whether this was just sloppy or deliberate?" (TR 730:8-13.) Dr. Fairley responded: "I couldn't - - no, I couldn't base (sic) that on my expertise. It would just be a guess on my part." (TR 730:18-19.)

[12] The remedy for "false" or "disparaging" statements would presumably be through a defamation action.

ALJ Wedekind next asked: "Okay. Same question with respect to care and coding, same answer?" (TR 730:20-21.) To which Dr. Fairley responded: "Same answer." (TR 730:23-25).

The ALJ was therefore correct when he ruled that "the statistician did not tetify that the reports' conclusions about the septicemia and malnutrition data were incorrect; indeed, he admitted that he did not even attempt to deterine if they were incorrect." (TR. 666.) (Decision at 25:2-4.) Furthermore, in rejecting the Respondents' request for an adverse interest finding, the ALJ held that "the reports relied on puclic Medicare datea and Respondes admit that at least on objective of the reports was to bring pressur on the hospitals to accede to UHW's collective-bargaining demands." (Decistion at 25, n. 39.) The ALJ further noted that "Respondents and their parent Prime, who own and manage the hospitals, are uniquely in possession of all the information relevant to whether the stated conclusions in UHW's reports about Prime are baseless." *Id.*

At trial, Respondents also alleged that UHW should be disqualified from representing the employees based on the Union's sponsoring of various ballot initiatives or for taking various lobbying or legislative actions designed to pressure Prime and/or the Hospitals to accept the unions' bargaining demands.[13] This activity is also within the bounds of protected

[13] For example, Respondents introduced a UMHW flyer asking the Governor to sign SB 408, this conduct does not support the disqualification defense. (Resp. Ex. 216.) Respondents also introduced a Los Angeles Times article, dated March 10, 2012, concerning SEIU sponsored ballot measures. (Resp. Ex. 537.) The sponsorship of this ballot measure did not satisfy the burden of the disqualificaiton defense based on the holding in *Massachusetts Society for the Prevention of Cruelty to Children v. NLRB*, 297 F.3d 41 (2002). Based on the article, the ballot measure would apply to all private competitors of Dignity Health (the state's largest hospital chain) and Kaiser Permanente (the largest HMO) "from charging more than 25% above the actual cost of providing care and require nonprofits to devote at least 5% of their pateint revenue to free care to the poor" – not solely Prime, as such the ALJ should afford no weight to this document. (Resp. Ex. 537.) Respondents also introduced Exhibit 598, a UHW PowerPoint presentation entitled "Prime Healthcare's Record & Prospective Payment in California". (Resp. Ex. 598; TR 542:7-25; 543:1-25.) This presentation is available at the California Senate website under the heading of a February 24, 2012 Joint Informational Hearing of the Senate and Assembly Health Committees concerning Hospital Reimbursement Mechanisms. Respondents' counsel stated that the presentation was in support of SB 1285. (TR 543:14.) Again, this conduct did not support the disqualification defense.

activity. *See Union Carbide Corp.*, 259 NLRB 974, 977 (1981), *enforced in peritent part*, 714 F.2d 657 (6th Cir. 1982); *Kaiser Eng'rs,* 213 NLRB 752, 755 (1974), *enforced*, 538 F.2d 1379 (9th Cir. 1976); *cf. USS-POSCO Indus .v. Contra Costa Cnty. Bldg. & Const. Trades Council, AFL-CIO*, 31 F.3d 800, 810 (9th Cir. 1994)(noting union's First Amendment Right extends to "lobbying of government officials and petitioning of administrative agencies and courts"); *Brown & Root, Inc. v. Louisiana State AFL-CIO*, 10 F.3d 310 (5th Cir. 1994).

Even where a union's support for regulatory reform would directly *put an employer out of business*, the Board has *declined* to find a disabling conflict of interest. In *W. Great Lakes Pilots Ass'n,* 341 NLRB 272 (2004), the ALJ, affirmed by the Board, held as follows:

> To allow a confict of interest to suspend a bargaining representative's ability to represent employees who have chosen it as their representative, while legislative or regulatory change is under consideration and moves through the process, would be to deprive employees of representation of their choice for a substantial period of time. Even where a bargaining representative supports legislation or regulation detrimental, or possibly fatal, to the employer's continued existence, there is no guarantee that legislators or regulators – both free from control by bargaining representatives – will eventually adopt the particular legislation or regulation that a bargaining representative is supporting. Meanwhile, employees will have been deprived of the representation supposedly guaranteed them by the Act and, in turn, needed to promote the free flow of commerce. Therefore, I conclude that no conflict of interest can be said to exist solely because a bargaining representative advocates legislation or regulation that operates to an employer's detriment, without at least some more specific showing of detriment to the collective-bargaining process and the employees whom that bargaining representative is supposed to be fairly representing.

W. Great Lakes Pilots Ass'n, 341 NLRB at 283; *see also Id.* at 272 (Battista, Chairman concurring)(agreeing that employer failed to meet its "heavy burden" of establishing union's confict of interest where union's proposal, even if it would have put employer out of business, "could not be accomplished by the union itself" but "could only be accomplished by the Coast Guard.") Therefore, even if UHW had lobbied for regulatory or legislative reform that would have been detrimental, or even fatal, to Prime's ability to acquire new hospitals, that activity would not establish that UHW had a disqualifying conflict of interest.

Prime, however, presented evidence to show it is a successful hospital that has received top "accolades" and "awards" – so it was not claiming that UHW was trying to run Prime out of business, instead, Respondents claimed that UHW interefered with Prime's ability to acquire new hospitals.[14] However, the Board has already rejected the argument that a union's opposition to an employer's growth within a particular market creates a disabling conflict of interest. *See Universal Fuels*, 270 NLRB at 539041 (holding that union's opposition to contracting out government services did not create a conflict of interest where it simultaneously represented employees of government contractor).

To prove UHW's interference with Prime's attempts to purchase hospitals, Respondents presented various documents.[15] However, as the ALJ correctly found, none of

[14] Respondents introduced documents to show Prime's "numerous accolades and awards". (TR 455; 463; 465-466; 467-468; Resp. Ex. 358; Resp Ex. 359, Resp. Ex 83; Resp. Ex. 810.)

[15] For example, Respondents introduced Exhibit 201 - an April 2, 2010 press release from UHW's website entitled "As predatory owner Prime Healthcare tries to snatch up four Orange County Hospitals . . . Community, Healthcare Workers Protest, Demand Patients First, Not Profits". (TR 340:10-24.) Respondents' Exhibit 201 is critical of Prime and its cost-cutting ways and predatory allegations which impact patients. (Resp. Ex. 201.) Respondents also introduced a June 3, 2010 press release from UHW's website concerning opposition to Prime Healthcare's takeover of San Leandro Hospital and UHW's concerns over this takeover. (Resp. Ex. 203; TR 351:2-15.) Respondents introduced Exhibit 209, a letter dated October 20, 2010, from the President of the California State Council of the Service Employees International Union (a separate entity autonomous to UHW and non-party to this proceeding) to the Licensing and Certification Director of the California Department of Public Health calling attention to the high septicemia rates at Prime, referencing UHW's report, and formally asking that the California Department of Public Health "withhold approval of any new licenses for Prime until all investigations are complete." (Resp. Ex. 209 at p. 3.) Schottmiller testified that Respondents' Exhibit 209 was "SEIU's attempt to block an acquistion of a hospital in California." (TR 379:22-25; 380:1-14.) The State Council is not a party to this proceeding and no evidence was presented to show that UHW has any control over this entity. (TR pp. 381-382.) Schottmiller testified that Respondents' Exhibit 210 demonstrated another attempt by UHW to interfere with the acquisition of hospitals. (TR 383:2-22.) Respondents also introduced a UHW flyer opposing the sale of Victor Valley Community Hospital with an attached July 22, 2011 news alert. (Resp. Ex. 217.) And, Respondents' Exhibit 254 a February 11, 2011 statement from UHW's website entitled, "Prime Healthcare should be denied new hospital licenses until Federal, State investigations into extraodinary high septicemia, malnutrition rates and risk to patients are complete" similarly does not support the disqualification defense. (Resp. Ex. 254.) Nor does Respondents' Exhibit 502, a UHW September 20, 2011 press release announcing the the Attorney General's rejection of Prime's bid to purchase Victor Valley Hospital. (Resp. Ex.

the conduct that UHW interfered with Prime's acquisition to acquire new hospitals as a basis for the disqualification defense. *Universal Fuels,* 270 NLRB at 539-41. Additionally, in *Massachusetts Society for the Prevention of Cruelty to Children v. NLRB,* 297 F.3d 41 (2002), the First Circuit upheld the Board's decision striking the respondent's conflict of interest defense. The First Circuit, agreeing with the Board, found that the union's conduct of reprinting news stories objecting to privatization of services then provided by state employees; legislation submitted by the Massachusetts ALF-CIO, of which the union was a member of, that would require private contractors to hire state employees whose jobs were affected by privatization; and bargaining proposals made by the alliance of labor organizations limiting privatization, did not amount to a conflict of interest. *Id.* at 50-51. The First Circuit held that the union's actions were a "far cry from such destruct tactics" where the Board has found a conflict of interest. *Id.* at 51. Similarly, here, there was no evidence that conduct presented by Respondents presented a "danger that such action jeopardizes" UHW's "ability to engage in good faith bargaining" with Respondents. *Id.*

Accordingly, based on the evidence at trial, the Board should affirm the ALJ's Decision and Respondents' Exceptions should be denied in their entirety.

D. THE ALJ APPLIED SANCTIONS AS TO UHW AND THE GENERAL COUNSEL.

While UHW disagreed with the ALJ's imposition of sanctions as to UHW and the General Counsel, ALJ Wedekind, nonetheless, granted Respondents' request for sanctions and issued *Bannon Mills* sanctions.[16] Pursuant to the sanctions order, during the hearing ALJ Wedekind allowed Respondents to introduce secondary evidence, prohibited UHW and the General Counsel from presenting evidence or cross-examining any witnesses with respect to

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502: TR 511.) Respondents also introduced Exhibit 240, a press release, dated October 12 of 2010, regarding the septicemia report and no new licenses to Prime Healthcare while under investigation. (Resp. Ex. 240.) Again, none of this conduct supported the disqualification defense.

[16] UHW argued in its posthearing brief that sanctions were inappropriate because UHW had substantially complied with the subpoenas and the ALJ's Order. Nonetheless, ALJ Wedekind imposed evidentiary sanctions against UHW.

the disqualification defense, and ruled that Respondents would be entitled to adverse inferences that the undisclosed documents and President Dave Regan's testimony would have supported Respodnnets' defense. (Decision at 25, n. 39.) The ALJ also specifically ruled that he would reserve ruling on "precisely what those adverse inferences would be" and advised the parties to address those issues in their posthearing briefs. *Id.* Contrary to Respondents' claims, the ALJ did not make any adverse inferences in favor of UHW. Instead, the ALJ made his decision and ruled on adverse inference findings based on the credible evidence presented at trial. The Board should therefore dismiss Respondents Exceptions and deny arguments that the ALJ did not apply his sanctions order.

E. THE ALJ CORRECTLY DID NOT AWARD ATTORNEYS' FEES AND COSTS TO RESPONDENTS.

Having found that Respondents violated the Act by ceasing the anniversary wage increase and refusing to provide information concernin Respondents' healthcare plans, and having rejected the Respondents' disqualification defense, the ALJ correctly ruled that fees and costs should not be awarded to the Respondents. Section 10(c) of the Act grants the Board broad remedial authority to "effectuate the policies" of the Act. The Board, through its inherent authority to control its own proceedings, has in limited situations, awarded litigation expenses through a showing of bad-faith. *See Frontier Hotel & Casino*, 318 NLRB 857 (1995), *enf. denied in part sub nom. Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997); *see also In Re Teamsters Local Union No. 122, Intern. Broth. of Teamsters*, 334 NLRB 1190, 1193 (2001).

In *Frontier Hotel & Casino,* the Board explained that the Supreme Court has recognized "in certain exceptional cases an award of attorney's fees is appropriate," even in the absence of a legislative grant of authority, where "overriding considerations indicate the need for such a recovery." *Id.* at 864, citing *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-392 (1970). The Board further explained that among these equitable exceptions is the bad-faith exception, under which "attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974). In *Roadway Express Inc. v. Piper*,

447 U.S. 752 (1980), the Court acknowledged that the bad faith required by the exception "may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation" 447 U.S. at 766 (quoting *Hale v. Cole*, 412 U.S. 1, 15 (1973). Applying this authority, the Board in *In Re Teamsters Local Union No. 122, Intern. Broth. of Teamsters*, 334 NLRB 1190 (2001), awarded litigation costs to the General Counsel and Charging Party where the Board found that the respondents engaged in bad faith negotiations and based on having litigated frivolous defenses. *Id*. at 1193-1194. The Board will award litigation costs where the defenses raised are "frivolous" rather than "debatable." *See Frontier Hotel & Casino*, 318 NLRB at 860; *see also In Re Teamsters Local Union No. 122, Intern. Broth. of Teamsters*, 334 NLRB at 1194. Likewise, under *Tiidee Products*, 194 NLRB 1234 (1972), *enfd.* 502 F.2d 349 (D.C. Cir. 1974), and its progeny, a respondent or charging party is subject to an award of attorney fees when it litigates in "bad faith" or engages in "frivolous" litigation.

Here, the Board should deny Respondents' Exceptions because order an award of attorneys' fees and costs to Respondents would be inapplicable in this matter because it cannot be shown that the UHW acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974). Nor can it be shown that UHW engaged in bad faith or frivolous litigation. Notwithstanding, Respondents' characterization of the Union's conduct throughout the litigation of this matter as "aggravating conduct", it does not rise to the level of bad faith necessary for the granting of an order of fees and costs. (TR 299:15-16.) UHW's litigation of the subpoenas based on relevance, the legal standard under *Flaum Appetizing* regarding not engaging in fishing expeditions, and the legal standard for application of the disqualification/conflict of interest defense was and is not frivolous. UHW, in good faith, litigated these issues throughout the course of these proceedings.

Additionally, UHW did in fact substantially comply with an overwhelming majority of the four subpoenas issued to it. The only subpoenaed items that UHW refused to comply with

were items 42 – 52, 54, and 70 of the subpoena issued to UHW (and the identical requests in the subpoena issued to Dave Reagan). Also, Respondents elected not to seek subpoena enforcement when the ALJ denied UHW's motion for continuance and UHW indicated that it would not be able to compy with all of the subpoena requests. Instead, Respondents sought evidentiary sanctions under *Bannon Mills.* The issuance of evidentiary sanctions as to the documents not produced or as to the failure to produce Dave Regan to testify did not warrant the award of fees and costs. *See Selwyn Shoe Mfg. Corp.,* 172 NLRB 674, 674-675 (1967)(holding that evidentiary sanctions ought to be narrowly tailored to the subject of the noncompliance).

Moreover, the Judge in *Station Casinos, LLC,* 358 NLRB No. 153 (September 28, 2012), a case relied upon by ALJ Wedekind in his sanctions award, did not issue attorneys' fees and costs for subpoena noncompliance, holding:

> I do not find that an award of litigation costs is warranted here. Although I have found that the Charging Party failed to live up to its subpoena compliance obligations, the Charging Party's misconduct does not rise to the level of bad faith that would support an award of litigation costs. . . . . Finally, I have considered the fact that although the Board has decided several cases in which a party has explicitly and deliberately refused to comply with a subpoena (by withholding subpoenaed documents that are likely to be harmful to the party's case), ***I am not aware of any such case in which the Board has awarded litigation costs for that noncompliance***. As a result, I cannot find that the circumstances of this case warrant a finding of bad faith and an award of litigation costs.

Id. at 24 (emphasis added). Accordingly, the ALJ correctly held that UHW's conduct did not warrant the awarding of fees and costs for any noncomplinace.

Additionally, the non-appearance of Dave Regan dis not warrant an award for fees and costs. At the completion of the first day of hearing, Respondents knew that they would be presenting their case in chief and had planned on starting with their first witness Ms. Schotmiller. (TR 269:9-17.) Indeed, Respondents' counsel, Colleen Hanrahan stated on the record that Respondents "expect to open our case with Ms. Schotmiller tomorrow" and expected Mr. Dave Regan to follow. (TR 273:4-9.) Ms. Hanrahan further stated: "I will tell you that we have quite a few documents to cover with Ms. Schotmiller on direct, so I can't

really give you an idea of when Mr. Regan will be starting. But, you know, I expect a couple of hours with Ms. Schotmiller." (TR 273:11-14.)

Ms. Hanrahan, at the end of the first day of hearing, made the formal request that Mr. Regan be available and that he would testify after Schotmiller. (TR 273:7-10.) Counsel for UHW stated that Mr. Regan had been subpoenaed for the entire week and that she would check as soon as the parties were done with the hearing on whether Mr. Regan would be available. (TR 273:21-24; 274:1-2.) Counsel for UHW also stated that if she had any different information, she would immediately email or call Respondents' counsel. (TR 274:10-14.) Respondents' counsel indicated that they were trying to get a handle of the witness order and be able to get their expert witness "in and out". (TR 274: 6-9, 15-18.) Later that evening, UHW informed Respondents that it would not be producing Mr. Regan.

On the second day of trial, counsel for UHW explained that Mr. Regan would not be available for two reasons. First, in light of the fact that the Union did not produce responsive documents, it would not produce Mr. Regan to testify. Second, Mr. Regan was out of the country and therefore not available. (TR 289:24-25; 299:1-14.) Based on the non-appearance of Mr. Regan, Respondents claimed that they were at a "disadvantage" and needed a couple of hours to reconstitute the order of documents they expected to introduce through Mr. Regan in order to introduce them through Ms. Schotmiller. (TR 300:2-9.) The ALJ, noting that Respondents had indicated on the previous day that it had another witness who was prepared to testify first, nevertheless granted Respondents' request to begin after lunch. (TR 302:4-16.) These facts do not warrant the granting of attorneys' fees and costs.[17] *See Station Casinos, LLC, supra,* at 24.

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[17] "The Board has also stated that litigation costs may be awarded for discrete misconduct (as opposed to awarding costs for the entire case) where appropriate." See *Station Casinos, LLC*, 358 NLRB No. 153, at 23 (September 28, 2012); see also *Selwyn Shoe Mfg. Corp*., 172 NLRB 674, 674-675 (1967)(holding that evidentiary sanctions ought to be narrowly tailored to the subject of the noncompliance).

IV. CONCLUSION

For the foregoing reasons, UHW requests that the Board deny Respondents' Exceptions to ALJ Wedekind's Decision and affirm that Respondents violated the Act by failing to provide information and unilaterally discontinuing the anniversary wage increase. UHW further requests that the Board affirm ALJ Wedekind's Decision rejecting Respondents' disqualification defense.

Dated: March 16, 2015

Respectfully submitted,

WEINBERG, ROGER & ROSENFELD
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By: */s/ Monica Guizar*
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PROOF OF SERVICE

I am a citizen of the United States and an employee in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is 800 Wilshire Boulevard, Suite 1320, Los Angeles, California 90017. On March 16, 2015, I served upon the following parties in this action:

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Copies of the document(s) described as:

[*CORRECTED – CONFORMING BRIEF*] SEIU UHW-WEST'S ANSWERING BRIEF IN OPPOSITION TO RESPONDENTS' EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

[X] BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from lissa@unioncounsel.net to the email addresses set forth above.

I certify under penalty of perjury that the above is true and correct. Executed at Los Angeles, California, on March 16, 2015.

/s/ Guadalupe Issa
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